In response to the removal proceedings, petitioners renewed their request for asylum and withholding of removal, which the INS had not yet addressed. In August 1999, an immigration judge denied their claims and found that they were removable. In February 2003, the BIA affirmed the immigration judge's order. See Pet. App. 3a.

While the removal proceedings were pending, the INS approved a petition for a work visa that Germaine's employer had previously filed on her behalf, making the couple eligible to apply for permanent residence. Pet. App. 3a-4a. Petitioners accordingly requested that the BIA re-open removal proceedings and remand to the immigration judge to adjust their status as authorized under 8 U.S.C. 1255. *Ibid.*

The BIA denied petitioners' motion in July 2003. Relying on 8 C.F.R. 1245.1(c)(8), the BIA concluded that, because petitioners were arriving aliens in removal proceedings, they were categorically ineligible to apply to adjust their status. Pet. App. 4a.[3]

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petitioners applied for and received "advance parole," which may be issued to aliens in the United States who have "an unexpected need to travel abroad * * * and whose conditions of stay do not otherwise allow for readmission after temporary departure." U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 83 (2004), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. Like all paroled aliens, advance parolees are not considered "admitted," see 8 U.S.C. 1182(d)(5)(A) – that is, lawfully inspected aliens authorized to enter, 8 U.S.C. 1101(a)(13)(A). Thus, after the conditions of advance parole are met, advance parolees are subject to investigation regarding their eligibility for admission. See *id.* § 1182(d)(5)(A).

[3] In December 2003, the BIA also denied petitioners' motion for reconsideration of its July 2003 denial of the motion to re-open. See Pet. App. 17a-19a. That denial is not at issue here. See *id.* 4a n.4.

3. Petitioners timely appealed the BIA decision to the Eighth Circuit. Petitioners argued, *inter alia*, that 8 C.F.R. 1245.1(c)(8) is invalid because it categorically prohibits an entire class of aliens from applying for adjustment of status notwithstanding Congress's explicit directive in 8 U.S.C. 1255 that such aliens are eligible to apply in appropriate circumstances. That argument had been adopted by the First Circuit in *Succar*, *supra*. According to the First Circuit, the regulation was invalid under the first step of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because in Section 1255 "'Congress ha[d] directly spoken to the precise question at issue'" – *viz.*, whether paroled aliens, such as petitioners, could be eligible to apply for adjustment of status. *Succar*, 394 F.3d at 22 (quoting *Chevron*, 467 U.S. at 842).

The Eighth Circuit expressly rejected the holding of *Succar*. Pet. App. 8a. First, the Eighth Circuit explained that in its view, 8 C.F.R. 1245.1(c)(8) is not "properly evaluated under *Chevron*'s first step, given the discretionary nature of the relief available under 8 U.S.C. § 1255." *Ibid.* Thus, although the Eighth Circuit agreed with the First Circuit that "Congress surely did speak to eligibility in" Section 1255, it construed the statute to leave "the question whether adjustment-of-status relief should be granted to the Attorney General's discretion." *Ibid.* Such discretion, the court emphasized, may be exercised either "by rule or on a case-by-case basis." *Id.* 9a (citing *Bellis* v. *Davis*, 186 F.3d 1092, 1094-95 (CA8 1999)).

Second, the Eighth Circuit rejected the First Circuit's reasoning that Section 1255's "unequivocal[]" statement that "statutorily eligible aliens must be allowed to apply for status adjustment" precluded the Attorney General from nonetheless by regulation categorically excluding those very aliens from applying for adjustment of status. Pet. App. 10a (citing *Succar*, 394 F.3d at 28). The Eighth Circuit concluded instead that the Attorney General's determination to categorically prohibit applications from aliens in removal

proceedings was consistent with the discretion conferred by Section 1255. The court found no reason why the Attorney General should "be forced to exercise his discretion through rules that speak only to the ultimate relief rather than eligibility[.]" Pet. App. 10a.

The court next rejected the First Circuit's view that this Court in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), had held that "if Congress had spoken to eligibility, then an administrator with discretion to grant relief cannot impose eligibility requirements that are not found in the statute." Pet. App. 11a. The Eighth Circuit distinguished *Cardoza-Fonseca* on the ground that 8 C.F.R. 1245.1(c)(8) "does not purport to interpret statutory eligibility standards but rather rests on the discretionary authority that Congress explicitly gave the Attorney General to grant adjustment-of-status relief." *Ibid.* Further, unlike the regulation at issue in *Cardoza-Fonseca*, the court below found that Section 1255 does not manifest a "congressional intent * * * that limits the Attorney General's ability to determine by regulation which statutorily eligible aliens will get the relief that he has the power, but not the duty, to grant." *Id.* 11a-12a.

After concluding that the regulation does not contravene Congress's express intent, the court moved to the second prong of the *Chevron* analysis. The Eighth Circuit expressly rejected the First Circuit's determination that the regulation was unreasonable because it "effectively barred most paroled aliens" from adjusting status. Pet. App. 12a n.9 (citing *Succar*, 394 F.3d at 18). The court first rejected, "as an evidentiary matter," the First Circuit's conclusion that the regulation bars "most" paroled aliens from adjusting their status. *Id.* 12a-13a n.9. In any case, that fact would not render the regulation invalid in the Eighth Circuit's view, because it found nothing in Section 1255 demonstrating "a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status." *Id.* 13a n.9.

The court then upheld the regulation as "reasonable" given the Attorney General's goal of expediting the removal of aliens. Pet. App. 12a. The Eighth Circuit reasoned that because applications for adjustment of status "would necessarily lengthen removal proceedings * * * and expediency was one of the goals of the 1996 [IIRIRA]," 8 C.F.R. 1245.1(c)(8) is valid. Pet. App. 12a-13a.

Judge Bye dissented. He would have held 8 C.F.R. 1245.1(c)(8) invalid for the reasons outlined by the First Circuit in *Succar*. See Pet. App. 13a.

4. Soon after the Eighth Circuit's ruling, two other circuits – the Third and Ninth – expressly rejected the Eighth Circuit's holding in this case and agreed with the First Circuit that Section 1245.1(c)(8) is invalid. *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005); *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005). Although petitioners' petition for rehearing and rehearing en banc specifically apprised the Eighth Circuit of the contrary decisions in *Zheng* and *Bona*, see Petrs. Pet. for Reh'g and Reh'g En Banc 1-2, 11-12, the court nonetheless denied rehearing and rehearing en banc, Pet. App. 14a.

In the Third and Ninth Circuit cases, the government requested that those courts hold further proceedings in abeyance and stay the mandate pending the outcome of this petition for certiorari. Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-71596 & -72488). The government explained that the question presented was both "an issue that affects the eligibility of numerous aliens to apply for adjustment of status to lawful permanent resident" and the subject of a clear and recurring circuit conflict that this Court could resolve in this case. *Ibid.*

This petition followed.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over whether, and if so why, 8 C.F.R. 1245.1(c)(8) is a valid interpretation of 8 U.S.C. 1255. This conflict is untenable not only because it results in the disparate treatment of paroled aliens across the country, but also because of the extraordinary impact of the question presented on the lives of those affected by the regulation. This case presents the ideal vehicle to resolve the question presented, which was squarely addressed below and was the sole basis for the court of appeals' decision. Finally, certiorari is also warranted because the Eighth Circuit's decision is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

8 C.F.R. 1245.1(c)(8) precludes *all* paroled aliens in removal proceedings from applying for adjustment of status. Whether the regulation is a valid interpretation of 8 U.S.C. 1255 is the subject of a widely acknowledged circuit conflict. Two circuits – the First and Ninth – hold that the regulation is invalid under the first step of the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because Congress considered and decided the question when it enacted the statute. The Third Circuit has also concluded that the regulation is invalid but disagrees with the reasoning of the First and Ninth Circuits, holding instead that the regulation survives the first step of *Chevron* but fails the second because it unreasonably interprets the statute. By contrast, only the Eighth Circuit has upheld 8 C.F.R. 1245.1(c)(8) as a valid interpretation of Section 1255.

In recent pleadings to the Third and Ninth Circuits, the government itself has recognized that the question presented "has created a significant circuit split,"[4] as have the courts of

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[4] Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-

appeals. See Pet. App. 8a; *Zheng* v. *Gonzales*, 422 F.3d 98, 111-12, 119-20 (CA3 2005); *Bona* v. *Gonzales*, 425 F.3d 663, 668 n.6 (CA9 2005). The BIA and commentators have similarly acknowledged the division in the circuits. *E.g.*, *In re Toussaint*, No. A96 001 425, 2006 WL 211046, at *1 n.1 (B.I.A. Jan. 10, 2006); *In re Cano-Porras*, No. A29 466 462, 2005 WL 3016055, at *2 (B.I.A. Aug. 15, 2005); Gerald Seipp, *Law of "Entry" and "Admission": Simple Words, Complex Concepts*, 05-11 IMMIGR. BRIEFINGS 1, 22 n.129 (Nov. 2005); *Ninth Circuit Joins First and Third Circuits in Invalidating Regulations Rendering "Arriving Aliens" in Removal Proceedings Ineligible for AOS*, 82 INTERPRETER RELEASES 1793, 1799-1800 (2005).

1. As the Eighth Circuit acknowledged, see Pet. App. 8a, its holding directly conflicts with the precedent of the First Circuit. In *Succar* v. *Ashcroft*, 394 F.3d 8 (2005), the First Circuit relied on the first prong of *Chevron* to hold that 8 C.F.R. 1245.1(c)(8) is invalid because it directly conflicts with 8 U.S.C. 1255. See 394 F.3d at 35-36.[5] Because Congress in Section 1255(a) "defined certain categories of aliens who were eligible to apply for adjustment of status * * * and refined the definition by specifically excluding certain aliens from eligibility" elsewhere in the same provision, the First Circuit reasoned that Congress had "unambiguously reserved to itself the determination" of which aliens may apply. 394 F.3d at 24. Section 1245.1(c)(8) fails the first step of *Chevron*, the court

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71596 & -72488); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634).

[5] See also *Rivera* v. *Ashcroft*, 394 F.3d 37, 40 (CA1 2005) (remanding the BIA's denial of a parolee's motion to apply for adjustment of status, holding that the order could not be sustained because Section 1245.1(c)(8) provided "the sole basis" for the agency's action).

concluded, because it conflicts with Congress's explicit determination in Section 1255 that paroled aliens in removal proceedings who meet specified criteria be eligible to apply for adjustment of status. *Id.* at 24-26.

The conclusion that the regulation is an invalid implementation of Section 1255 is bolstered, the First Circuit found, by the broader statutory scheme, through which "Congress clearly stated that most parolees would be in removal proceedings." 394 F.3d at 26. While acknowledging that Congress had authorized the Attorney General to decide "whether to grant permanent resident status" in individual cases, the court held that Congress had *not* authorized the Attorney General to render ineligible the entire class of paroled aliens in removal proceedings without any consideration of individual circumstances. *Id.* at 28. Citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 443 (1987), the First Circuit explained that "[t]he mere fact that a statute gives the Attorney General discretion as to whether to grant relief after application does not by itself give the Attorney General the discretion to define eligibility for such relief." 394 F.3d at 10.

Finally, the First Circuit concluded, the legislative history confirms that deeming paroled aliens in removal proceedings ineligible to apply for adjustment of status would actually "re-institute the very problems which Congress attempted to eliminate" in Section 1255. 394 F.3d at 34. In particular, the court found that Congress intended to make the application process more efficient by abolishing the wasteful practice of requiring a paroled alien to leave the country in order to apply for adjustment of status, a practice that Section 1255 was meant to end, but which the regulation would once again reinstate for many paroled aliens. *Id.* at 33.

The Ninth Circuit has similarly acknowledged the circuit conflict and invalidated the regulation. In *Bona* v. *Gonzales*, 425 F.3d 663, 668 n.6 (CA9 2005), that court expressly "reject[ed]" the holding of the Eighth Circuit in this case and instead adopted the First Circuit's holding in *Succar*. *Id.* at

665. Like the First Circuit, the Ninth Circuit reasoned that the regulation fails the first step of the *Chevron* analysis because it contradicts Congress's explicit determination "of which aliens were eligible to apply for adjustment of status." *Id.* at 669-70. The court further emphasized that the contradiction was "absurd" given "the larger statutory scheme." *Ibid.*

The Third Circuit, in turn, also has expressly rejected the Eighth Circuit's ruling in this case, although it reached that result under the second step of the *Chevron* analysis. See *Zheng* v. *Gonzales*, 422 F.3d 98, 120 (CA3 2005). Unlike the First and Ninth Circuits, the Third Circuit concluded that Congress's statutory determination of eligibility and ineligibility for some categories of aliens "does not in itself conclusively prove that the Attorney General cannot declare other categories ineligible by regulation." *Id.* at 116. The Third Circuit noted that this Court held in *Lopez* v. *Davis*, 531 U.S. 230 (2001), that the Bureau of Prisons had statutory discretion to deny early release to a class of prisoners by regulation. Though it found the question "close," the Third Circuit accordingly held that Section 1245.1(c)(8) is not invalid under the first step of *Chevron* because Section 1255 is "ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status." 422 F.3d at 116.

The Third Circuit nonetheless held that 8 C.F.R. 1245.1(c)(8) is invalid under the second step of *Chevron*. The court reasoned that the regulation was an unreasonable interpretation of Section 1255 because it contravenes "Congress's clearly expressed intent * * * to allow most paroled aliens to apply for adjustment of status," by barring almost every parolee from applying for such adjustment. 422 F.3d at 119. See also *id.* at 117 ("It is clear from the statutory text that Congress intended for virtually all parolees to be in removal proceedings.").

2. Only this Court can resolve the circuit conflict. In concluding that 8 C.F.R. 1245.1(c)(8) is a valid interpretation of Section 1255, the Eighth Circuit expressly acknowledged the contrary holding of the First Circuit and proceeded to reject not only the result but also every aspect of that court's reasoning. See *supra* at 8-9. The Eighth Circuit subsequently refused to reconsider its position, denying rehearing en banc even after petitioners drew its attention to the subsequent contrary decisions of the Ninth and Third Circuits. See Petrs. Pet. for Reh'g and Reh'g En Banc 1-2.

The positions of the other circuits are similarly entrenched. Before reaching its conclusion in *Zheng*, the Third Circuit devoted nine pages of its opinion to rejecting the reasoning of both the First and Eighth Circuits. See 422 F.3d at 111-20. The Third Circuit subsequently denied the Attorney General's petition for rehearing. And although the First Circuit was the first court of appeals to address the question presented, it issued two separate opinions outlining its *Chevron*-based reasoning at length. See *supra* at 11-12. The Ninth Circuit, which explicitly adopted the First Circuit's rationale in *Bona*, *supra*, has since reaffirmed that holding in a unanimous panel decision without even hearing oral argument on the question. See *Ali* v. *Gonzales*, 154 Fed. Appx. 608 (Nov. 16, 2005) (unpublished).

3. The question presented would not benefit from further percolation. Although the courts of appeals have fully considered each other's approaches, they have then employed divergent reasoning to reach diametrically conflicting results. Indeed, this legal issue cannot develop further because the circuits have reached every possible analytical result under the two-step *Chevron* analysis: the First and Ninth Circuits hold that 8 C.F.R. 1245.1(c)(8) is invalid at step one; the Third Circuit holds that the regulation is invalid at step two; and the Eighth Circuit holds that the regulation is valid.

4. Nor is there any genuine prospect that the circuit split will be resolved by withdrawal or amendment of the

regulation. Three successive attorneys general have vigorously enforced the regulation through two presidential administrations. Attorney General Gonzales continued to defend Section 1245.1(c)(8) in the Third, Eighth, and Ninth Circuits even after the First Circuit struck the regulation down in January 2005.[6] In fact, the Department of Homeland Security ("DHS") has attempted to enforce the regulation in the Ninth Circuit even after that court found it invalid in *Bona*. See *Ali*, 154 Fed. Appx. at 608. Further, the BIA has consistently rejected challenges to Section 1245.1(c)(8) in circuits that have not held the regulation invalid. See, *e.g.*, *Toussaint*, 2006 WL 211046, at *1 (acknowledging the circuit split but remaining unpersuaded "that the First Circuit's decision in [*Succar*] warrants a different result"); *Cano-Porras*, 2005 WL 30016055, at *2 (acknowledging *Succar* but nonetheless holding paroled alien ineligible to seek adjustment of status).

5. This case provides the ideal vehicle for deciding whether 8 C.F.R. 1245.1(c)(8) is a valid interpretation of 8 U.S.C. 1255. The issue was squarely presented and preserved below and is outcome-determinative for petitioners, who may apply to adjust their status only if this Court decides that 8 C.F.R. 1245.1(c)(8) is invalid.[7]

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[6] Cf. *Plumaj* v. *Gonzales*, 141 Fed. Appx. 186 (CA4 Aug. 19, 2005) (per curiam) (upholding BIA denial of aliens' motion to reconsider its order denying aliens the opportunity to apply for adjustment of status because aliens were ineligible under Section 245.1(c)(8)).

[7] The court of appeals did not reach the separate question whether petitioners satisfy other statutory eligibility requirements. See Pet. App. 5a-6a; Petrs. C.A. Br. 16-20; Resp. C.A. Br. 17-24. That question remains open for decision on remand. Cf. *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

The conflict over the validity of 8 C.F.R. 1245.1(c)(8) merits this Court's attention in light of the question's undeniable importance. Whether the regulation is valid – and, thus, whether aliens such as petitioners are eligible to apply for adjustment of status – has widespread implications for a large group of individuals. The government agrees. Despite previously citing "internal statistics" suggesting that few paroled aliens are affected by the regulation, see Resp. Supp. Br. Post-Arg. 13 n.1, the government subsequently advised the courts of appeals that the question presented "affects the eligibility of *numerous* aliens."[8]

In 2003, the last year for which the relevant data is reported, 264,777 paroled aliens entered the United States. See U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 81 tbl.G (2004), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. As the Third and First Circuits have both recognized, "virtually all parolees will be in removal proceedings" – and thus subject to the regulation – at some point given the mandate of Section 1225(b)(2)(A). *Zheng*, 422 F.3d at 117; *Succar*, 394 F.3d at 27 ("Congress purposefully classified paroled individuals as 'inadmissible,' and it also determined that they should generally be placed in removal proceedings.").

The regulation not only affects a large group of aliens, but it also has significant ramifications for each of the affected individuals. Put simply, what is at stake is the opportunity to stay in a country in which one has made a

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[8] Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Zheng* v. *Gonzales*, 422 F.3d 98 (CA3 2005) (No. 03-3634) (emphasis added); Resp. Mot. to Hold Further Procs. in Abeyance and Stay the Mandate 2, *Bona* v. *Gonzales*, 425 F.3d 663 (CA9 2005) (Nos. 03-71596 & -72488) (same).

home. Many of those affected by this regulation have established deep roots in the United States and have become active members of their communities. "Until the final order of removal, which in some circumstances * * * can take years, paroled aliens in removal proceedings * * * live, work and form relationships within the United States." *Succar*, 394 F.3d at 16.

Indeed, petitioners themselves epitomize the profound impact of this regulation. During the seventeen years they have been in the United States, the Mouelles have integrated themselves into their community. They have become valued employees,[9] are active members of their church, and own a home. Petitioners are raising two children, ages twelve and fourteen, who were born in the United States, are U.S. citizens, and have never been to Congo. See Petrs. Mot. to Stay the Mandate 3.

Should petitioners be forced to return to Congo – a country still recovering from civil conflicts that began in 1997 and continued through December 2003 – their lives would change drastically. Congo, which has a seventy-percent poverty rate, remains politically unstable as "[u]ncontrolled and unidentified armed elements remain[] active in" parts of the country. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: REPUBLIC OF CONGO (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41598.htm. The State Department has found that "the Government's human rights record remain[s] poor," ethnic

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[9] See Letter from Trancey B. Williams, Minn. Dep't of Nat'l Resources (Apr. 17, 2001) (administrator indicating that he would "gladly give up ten other employees just to hold on to [Dr. Mouelle]"), attached as Ex. to Petrs. Response to DHS Opp. to Mot. to Reopen; Memo. from John Boughton, Mgr. of Int'l Nurse Recruitment, LLC to Bureau of Citizenship and Immigration Services (Mar. 19, 2003) (describing Germaine Mouelle as a "valued employee"), attached as Ex. to Petrs. Mot. to Reopen to Apply for Adjustment of Status.

discrimination "remain[s] a problem," and security forces beyond the government's control commit serious human rights abuses that include rape and arbitrary arrest and detention. *Ibid.*

Given the importance of the question presented, it is not surprising that the regulation has been the subject of repeated recent challenges. Four circuits have decided the question. The regulation has also been challenged in the Fifth and Eleventh Circuits and at least one district court (in the Second Circuit), but those courts did not reach the question.[10] Additional cases challenging the regulation are currently pending in the Second, Fifth, Seventh, and Eleventh Circuits,[11] and there is no reason to believe that the pace of litigation will slow.

Particularly given that the Constitution contemplates "an uniform Rule of Naturalization," U.S. CONST. art. I, § 8, the notion that an alien's eligibility to apply for adjustment of status depends on the fortuity of the circuit in which he resides is entirely untenable. The very point of having federal

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[10] See *Diarra* v. *Gonzales*, 137 Fed. Appx. 627, 631-32 (CA5 2005); *Shah* v. *United States Attorney Gen.*, 151 Fed. Appx. 748, 751 (CA11 2005) (per curiam); *Kadriovski* v. *Gantner*, No. 04 Civ. M3168, 2004 WL 2884261, at **4-5 (S.D.N.Y. Dec. 13, 2004). Although the Fourth Circuit has not addressed the regulation's validity, that court has applied it in at least one case. See *Plumaj* v. *Gonzales*, 141 Fed. Appx. 186 (CA4 2005) (per curiam).

[11] See *Li* v. *Gonzales*, Nos. 03-41059 & 04-0902 (CA2); *Sanchez-Montoya* v. *Gonzales*, No. 04-1071 (CA2); *Singh* v. *Gonzales*, No. 04-0136 (CA2); *Salman* v. *Gonzales*, No. 04-60895 (CA5); *Dhurota* v. *Gonzales*, No. 05-2083 (CA7); *Scheerer* v. *Gonzales*, No. 04-16231-CC (CA11); *Sampedro-Dominguez* v. *Gonzales*, No. 05-13390-AA (CA11); *Garcia* v. *Gonzales*, No. 05-12059-DD (CA11); see also Mary A. Kenney, *American Immigration Law Foundation Practice Advisory: Adjustment of Status for "Arriving Aliens" in Removal Proceedings: Strategy Decisions to Challenge 8 C.F.R 245.1(c)(8)* 12-13 (2005), *available at* http://www.ailf.org.

rules rather than local control over immigration is undermined by an intractable split among the circuits.

III. The Text and Structure of 8 U.S.C. 1255 Establish Congress's Intent to Extend to Petitioners the Ability to Apply for Adjustment of Status.

Certiorari is also warranted because the decision below is wrong on the merits. The detailed eligibility scheme established by 8 U.S.C. 1255 manifests Congress's intent to allow certain classes of aliens, including many paroled aliens, to apply for adjustment of status. By categorically precluding "[a]ny arriving alien who is in removal proceedings," 8 C.F.R. 1245.1(c)(8), from seeking an adjustment of status, the regulation excludes individuals who fit within the category of persons Congress specifically determined should be entitled to seek adjustment. The regulation thereby conflicts with the plain terms of Section 1255 and upsets the carefully calibrated eligibility scheme established by the statute.

1. When analyzing the validity of an agency regulation, the first step is to determine – based on "traditional tools of statutory construction" – "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 842 (1984). If so, the courts and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Moreover, as in all immigration cases, any residual ambiguity should be resolved in favor of petitioners and result in invalidation of the regulation, in accord with the "longstanding principle of construing any lingering ambiguities in [removal] statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

In Section 1255, Congress clearly anticipated that aliens such as petitioners – *i.e.*, paroled aliens in removal proceedings – would be eligible to apply to adjust their status. First, in Section 1255(a), Congress extended eligibility to apply to adjust status to two broad classes of aliens – (1) those inspected and admitted; and (2) paroled aliens, who are

considered "applicant[s] for admission," see 8 C.F.R. 1001.1(q). Second, Congress established a detailed statutory scheme that generally results in paroled aliens being placed in removal proceedings: Section 1225(b)(2)(A) expressly provides that an "applicant for admission * * * *shall* be detained for a [removal] proceeding" unless he is clearly entitled to be admitted. 8 U.S.C. 1225(b)(2)(A) (emphasis added). See also *Zheng* v. *Gonzales*, 422 F.3d 98, 117 (CA3 2005) (statute explicitly envisions that the overwhelming majority of paroled aliens "will *necessarily* be in removal proceedings").[12]

Section 1245.1(c)(8), by contrast, prohibits all "arriving alien[s]" in removal proceedings from applying to adjust their status. Because all paroled aliens are deemed arriving aliens[13] and, as noted above, will generally be in removal proceedings, the regulation directly conflicts with Section 1255 by categorically barring adjustment of status applications from one of the two broad classes of aliens – *viz.*, paroled aliens – that Congress expressly specified are eligible to apply.

2. Having established broad eligibility for two classes of aliens – those who are inspected and admitted and those who are paroled – Congress in Section 1255 further refined eligibility for adjustment of status. As the First Circuit noted, Congress "made numerous and explicit policy choices about who is eligible for adjustment of status relief, who is ineligible, and of those ineligible, who is nonetheless eligible

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[12] As the Third Circuit has stressed, "[p]arole is a form of relief from immigration *detention*; it is not a form of relief from *removal proceedings*." *Zheng*, 422 F.3d at 117.

[13] Pursuant to 8 C.F.R. 1001.1(q), an arriving alien is, *inter alia*, "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry." Paroled aliens are considered "applicant[s] for admission." *Ibid.*

with certain application restrictions." *Succar* v. *Ashcroft*, 394 F.3d 8, 29 (2005).

This reticulated scheme demonstrates that Congress has specified which aliens who might otherwise fall within Section 1255(a)'s broad eligibility definition are nonetheless ineligible to apply for adjustment of status. Significantly, none of Congress's refinements to the statute categorically provide "that an alien is ineligible to adjust status if he is in removal proceedings." *Succar*, 394 F.3d at 25.[14]

Section 1255(c), for instance, restricts the eligibility of alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without a visa. Section 1255(i) adds further precision to the regulatory scheme, extending adjustment of status eligibility to aliens who obtain work-related visas even if they would otherwise be ineligible pursuant to Section 1255(c).

That Congress took great care in defining eligibility to adjust status is also reflected in 8 U.S.C. 1255(e), the only provision that deems relevant an alien's presence in removal proceedings. Section 1255(e) carves out a small class of otherwise eligible aliens – those applying for adjustment of status based upon a marriage entered into while in removal proceedings – as ineligible to adjust their status. Reading Section 1255 to grant the Attorney General power to categorically prohibit all paroled aliens in removal proceedings from applying to adjust their status renders the eligibility scheme carefully constructed by Congress – and in particular Section 1255(e) – surplusage. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause,

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[14] The absence of any indication in the statute that presence in removal proceedings should be relevant to eligibility is particularly significant because Congress has amended Section 1255 more than a dozen times since 1960, but has never suggested that aliens in removal proceedings are ineligible to adjust their status.

sentence, or word shall be superfluous, void, or insignificant." (internal quotes omitted)).

The degree of specificity and complexity exhibited on the face of this statute demonstrates that "Congress unambiguously reserved to itself the determination of who is eligible to apply for adjustment of status relief." *Succar*, 394 F.3d at 24. This conclusion is bolstered, not weakened, by *Lopez* v. *Davis*, 531 U.S. 230 (2001).[15] Contra *Zheng*, 422 F.3d at 113-14. In *Lopez*, this Court held that the imposition by regulation of eligibility requirements for an early-release program beyond those established by statute was a valid exercise of agency discretion. The Court relied on the fact that the statute in question, beyond granting discretion to reduce sentences of nonviolent offenders, did not identify "any further circumstance in which the Bureau either must grant the reduction, or is forbidden to do so." 531 U.S. at 242. By contrast, 8 U.S.C. 1255, which is replete with such references – varying eligibility to apply for adjustment by reference to, *inter alia*, work status, marital status, and residency status – reflects Congress's intent to constrain the Attorney General's discretion to establish categorical eligibility requirements.

3. The regulation also frustrates Congress's purposes in enacting 8 U.S.C. 1255. Congress sought to make application

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[15] *Lopez* is relevant to the first step of the *Chevron* inquiry, when Congress has answered the precise question at issue in the case. In *Zheng*, the Third Circuit asserted that *Lopez* puts the agency's "discretionary authority squarely within the second step of the *Chevron* framework." 422 F.3d at 113. This is only because "where Congress has enacted a law that does not answer 'the precise question at issue,' all we must decide is whether the [agency] * * * has filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" *Id.* at 113-14 (quoting *Lopez*, 531 U.S. at 242). When, as here, Congress has answered the precise question at issue, the analysis properly takes place within the framework of the first step of *Chevron*.

for adjustment of status less burdensome on the applicant and on the government by eliminating needless departures and re-entries:

> Congress, in amending the adjustment of status statute, wished to avoid a situation that, "not only necessitate[s] the reinstatement of the fallacious procedure known as 'preexamination' and consisting of round trips to Canada for the sole purpose of obtaining an immigrant visa, but will certainly greatly increase the number of private bills."

Succar, 394 F.3d at 33 (quoting S. REP. NO. 86-1651 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3124, 3137). In making this determination, "Congress clearly evaluated the administrative inconvenience to the INS of the expanded category of those eligible to apply for adjustment of status and nonetheless altered the prior procedure." *Id.* at 34.

The Attorney General's regulation returns a significant class of intended beneficiaries – paroled aliens – to precisely the situation the 1960 amendments were intended to avoid. This case is a perfect example. Under the agency's rule, not only must petitioners return to Congo and face a potentially threatening political climate before applying for adjustment of status, but they will then remain inadmissible to the United States for ten years, see 8 U.S.C. 1182(a)(9)(B)(i)(II), after which they may only apply from outside the United States. This is exactly what Congress intended to prevent with Section 1255.

4. To be sure, Section 1255 provides that the Attorney General retains discretion to decide whether eligible applicants will ultimately receive a status adjustment. See, *e.g.*, 8 U.S.C. 1255(a) ("status * * * may be adjusted by the Attorney General"); *id.* § 1255(i)(2) ("the Attorney General may adjust the status"). The statute's provisions must, however, be read as a whole. See *Pollard* v. *E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001). The Attorney

General's discretion cannot be read so broadly as to undo Congress's determination to permit paroled individuals to seek adjustment of status relief and its more general determination to specify the classes of persons who are, and are not, eligible to apply.

Notwithstanding the discretion retained by the Attorney General under Section 1255, the categorical bar created by Section 1245.1(c)(8) results in individual paroled aliens who would otherwise receive adjustment of status being denied the ability even to apply. In considering whether to exercise his discretion with respect to a particular application to adjust status, the Attorney General conducts an individualized determination, looking at such factors as family ties, hardship, and length of residence in the United States. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).[16]

He weighs those favorable factors against any adverse factors – such as a preconceived intent to remain in the United States or deliberate misstatements to a U.S. consul. See CHARLES GORDON ET AL., 4-51 IMMIGRATION LAW AND PROCEDURE § 51.05 (2005). "In the absence of adverse factors, adjustment will ordinarily be granted * * *." *Elkins*, 435 U.S. at 667 (citing *Arai*, 13 I. & N. Dec. at 496) (emphasis omitted). And even if adverse factors are present, favorable factors – in particular, an applicant's status as the immediate relative of a U.S. citizen or a lawful permanent resident, see *Matter of Ibrahim*, 18 I. & N. Dec. 55, 57-58 (B.I.A. 1981) – generally "will be considered as countervailing factors meriting favorable exercise of administrative discretion." *Elkins*, 435 U.S. at 667.

Thus, although the Attorney General would otherwise be very likely to exercise his discretion in favor of aliens – such

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[16] In *Elkins*, this Court relied on the BIA's then-recent decision in *Matter of Arai*, 13 I. & N. Dec. 494, 496 (B.I.A. 1970), noting that "[a]lthough adjustment of status is a matter of grace, not right," *Arai* was "binding" law on how that discretion was to be exercised. 435 U.S. at 667.

as petitioners – with close ties to the United States and the prospect of significant hardship if they were required to return to Congo, those aliens are unable even to apply for adjustment of status merely by virtue of being paroled aliens in removal proceedings. Given that significant numbers of paroled aliens *would* receive adjustments of status if they were accorded the individualized determination contemplated by Congress, the Attorney General has provided no reason why he should be permitted to categorically exclude *all* paroled aliens in removal proceedings from consideration.

5. The text, structure, and history of 8 U.S.C. 1255 clearly communicate Congress's intent regarding the precise issue at question in this case – *i.e.*, whether the Attorney General has discretion to declare all arriving aliens in removal proceedings ineligible to apply for adjustment of status. The answer to this question being no, the Court need not reach step two of the *Chevron* framework to determine whether the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

But even if this Court were to find that 8 U.S.C. 1255 "is ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status," *Zheng*, 422 F.3d at 116, the regulation would still be invalid because it is manifestly contrary to the statute and not "'reasonable in light of the legislature's revealed design.'" *Ibid.* (quoting *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). The strongest indication of the regulation's unreasonableness is the effect it would have on paroled aliens. As detailed above, "[w]e are thus faced with a statute providing that, in general, aliens paroled into the United States may apply to adjust their status, and a regulation providing that, in general, they may not." *Zheng*, 422 F.3d at 119. While administrative agencies generally receive broad deference in interpreting statutes, courts "have an even higher obligation to respect the clearly expressed will of Congress." *Id.* at 120. Here, when the regulation "essentially reverses the eligibility structure set out by

Congress," *ibid.*, in a manner that would make "a nullity of the statute," *INS* v. *Yang*, 519 U.S. 26, 31 (1996), that obligation mandates setting aside 8 C.F.R. 1245.1(c)(8) and allowing petitioners to apply for adjustment of status.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 2006

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 03-1760/03-3086

JEAN MOUELLE; GERMAINE MOUELLE,
PETITIONERS,
v.
ALBERTO GONZALES,[1] ATTORNEY GENERAL OF THE UNITED STATES,
RESPONDENT.

Submitted: October 21, 2004
Opinion Filed: July 29, 2005

Petitions for Review of Orders of the Board of Immigration Appeals.

Before BYE, BEAM, and GRUENDER, Circuit Judges.

OPINION

BEAM, Circuit Judge.

Jean and Germaine Mouelle ask us to grant a petition for review regarding two Board of Immigration Appeals (BIA) decisions rendered in their removal proceedings. We deny the petitions.

I. BACKGROUND

Jean Mouelle, a native and citizen of the Republic of Congo, entered the United States in 1989 as a J-1 exchange

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[1] Alberto Gonzales has been appointed to serve as Attorney General of the United States, and is substituted as respondent pursuant to Federal Rule of Appellate Procedure 43(c).

visitor so he could pursue masters and doctoral degrees from the University of Idaho. His wife, Germaine, also a native and citizen of the Republic of Congo, entered the United States as a dependent of an exchange visitor. The Mouelles did not return to the Republic of Congo when their nonimmigrant visas expired.

In May 1996, Jean filed an application for asylum and withholding of removal, naming Germaine as a dependent.[2] In May 1997, while their asylum application was pending, Jean was presented with the opportunity to go to Canada for field research and to assist a class that he was teaching. Cognizant of their immigration status and the likelihood that they would not be able to reenter the United States if they went to Canada, the Mouelles contacted the Immigration and Naturalization Service[3] and applied for advance parole, which would allow them to reenter the United States. The INS granted that request. The Mouelles left the United States on May 31, 1997, and reentered a day later, on June 1, 1997, at Eastport, Idaho, pursuant to their advance parole.

On April 15, 1998, the INS commenced removal proceedings against the Mouelles, serving them with notices to appear before an immigration judge. At the first removal hearing in August 1998, the INS realized the allegations contained in the notices to appear were inaccurate. The

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[2] Jean also came very close to obtaining lawful residency in 1994 when he won the diversity visa lottery. But, as a J-1 nonimmigrant, Jean was required to obtain a "no objection" letter from the Congolese government in order to relieve him of the J-1 two-year foreign residency requirement under 8 U.S.C. § 1182(e). Though Jean ultimately did get the "no objection" letter, he did not get it before his ability to obtain a diversity visa had expired.

[3] In March 2003, the functions of the Immigration and Naturalization Service were transferred to the newly formed Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, 6 U.S.C. §§ 101 et seq.

Mouelles, however, agreed to allow the INS to add additional removal charges. Those new charges sought removal under 8 U.S.C. §§ 1182(a)(7)(A)(i)(I) & (B)(i)(II), essentially for the Mouelles' failure to present proper documentation when they reentered the United States in June 1997. At the next removal hearing in October 1998, the Mouelles admitted that they were inadmissible under subsection (B)(i)(II) when they sought reentry in June 1997, and the immigration judge found that they were also inadmissible under subsection (A)(i)(I). In lieu of removal, Jean renewed his request for asylum and withholding of removal, which apparently had not yet been addressed by the INS. The immigration judge set the matter for an evidentiary hearing in August 1999.

At the evidentiary hearing in August 1999, the immigration judge denied the Mouelles' claims for asylum and withholding of removal. After finding that the Mouelles were removable, the immigration judge granted them the privilege of voluntary departure so long as they depart before October 5, 1999, and post departure bonds.

The Mouelles appealed the immigration judge's ruling to the BIA. The BIA affirmed the immigration judge's decision in February 2003. But because the Mouelles had not posted their departure bonds, the BIA revoked their privilege of voluntary departure, making the Mouelles immediately removable.

During the three-and-a-half years that their appeal was pending, the Mouelles sought employment-based visas. Jean filed an I-140 Immigrant Petition for Alien Worker on April 28, 2001. That petition was denied in November 2001, because Jean had not shown that it was in the nation's interest for the Attorney General to waive the job-offer requirement of 8 U.S.C. § 1153(b)(2)(B). Germaine had an I-140 Immigrant Petition for Alien Worker filed on her behalf by her employer, Presbyterian Homes and Services, Inc. That petition was approved in August 2002 under 8 U.S.C. § 1153(b)(3)(A)(i) or (ii) (skilled workers or professionals).

The Mouelles did not try to adjust their immigration status based on Germaine's approved I-140 petition until March 2003, after the BIA had affirmed the immigration judge's decision. In March 2003, the Mouelles filed applications to adjust their immigration statuses under 8 U.S.C. § 1255(i). And in May 2003, the Mouelles filed a motion to reopen their removal proceedings and remand the matter to the immigration judge so that they could apply for adjustment of status.

In July 2003, the BIA denied the Mouelles' motion to reopen, stating that they "are ineligible for adjustment of status because they are 'arriving aliens' in removal proceedings, notwithstanding the approved [I-140] visa petition."

The Mouelles were scheduled to be removed from the United States on May 7, 2003. We have stayed their removal, pending the resolution of their petitions for review.

The Mouelles have two pending petitions for review that have been consolidated here. The first, No. 03-1760, concerns the BIA's February 2003 denial of the Mouelles' asylum application. The second, No. 03-3086, concerns the BIA's July 2003 denial of the Mouelles' motion to reopen the removal proceedings.[4]

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[4] The Mouelles also filed a motion for reconsideration with the BIA in August 2003, asking the BIA to reconsider its July 2003 denial of their motion to reopen. The motion for reconsideration was denied in December 2003. The Mouelles have not petitioned for review of that decision, so it is not before us. *See Raffington v. INS*, 340 F.3d 720, 722 (8th Cir. 2003).

II. DISCUSSION

A. No. 03-1760: Asylum and Withholding of Removal

With regard to the initial BIA decision in February 2003, denying their claims for asylum and withholding of removal, the Mouelles argue only that the immigration judge violated their Fifth Amendment procedural due process rights.[5] The Mouelles did not present the due process issue to the BIA in their appeal or in their motion to reopen. Thus, we are without jurisdiction to consider it. *Sayaxing v. INS*, 179 F.3d 515, 522-23 (7th Cir. 1999). And, even if we had jurisdiction, the Mouelles' due process claim fails because they have not addressed, let alone established, prejudice--"that the outcome of the proceeding may well have been different had the due process violation not occurred." *Ismail v. Ashcroft*, 396 F.3d 970, 975 (8th Cir. 2005).

B. No. 03-3086: Adjustment of Status

All of the Mouelles' remaining arguments address the BIA's July 2003 denial of their motion to reopen the removal proceedings to allow them to apply for adjustment of status under 8 U.S.C. § 1255(i). "We have jurisdiction to review the BIA's denial of the motion to reopen for abuse of discretion." *Sidikhouya v. Gonzales*, 407 F.3d 950, 951 (8th Cir. 2005).

The BIA refused to reopen the Mouelles' removal proceedings because they were "arriving aliens in removal proceedings" under 8 C.F.R. § 1245.1(c)(8)[6] and were thus

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[5] Specifically, the Mouelles argue that the immigration judge failed to give them sufficient time to fully present their asylum and withholding-of-removal claims, interrupted Jean's testimony with questioning, "failed to elicit specific and detailed testimony that was material and significant," drew "odd conclusions before testimony was even completed," interrupted Jean's attorney, and cut off counsel's closing argument.

[6] The regulations were duplicated and renumbered while the Mouelles' proceedings were pending. As part of the Homeland

ineligible to apply for relief under 8 U.S.C. § 1255(i). The Mouelles make two arguments: (1) they were in fact eligible to adjust status under the regulations, and (2) if they were not, the regulations are invalid.

1. Status-Adjustment Eligibility Under the Regulations

As a matter of regulatory construction, the BIA's conclusion was correct. Section 1245.1(c) of the regulations lists certain categories of aliens who are "ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act [8 U.S.C. § 1255]." And section 1245.10(b) of the regulations--which deals specifically with adjustments under 8 U.S.C. § 1255(i)--incorporates those exclusions through its reference to section 1245.1(b), which, in turn, references section 1245.1(c). One of the section 1245.1(c) categories of ineligible aliens is "any arriving alien who is in removal proceedings pursuant to . . . section 240 of the Act [8 U.S.C. § 1229a]." 8 C.F.R. § 1245.1(c)(8).

The Mouelles were in removal proceedings under 8 U.S.C. § 1229a when they made their motion to reopen. But they argue that the BIA abused its discretion by denying their motion based on 8 C.F.R. § 1245.1(c)(8) because they are not arriving aliens. The term "arriving alien" is defined as

> an applicant for admission coming or attempting to come into the United States at a port-of-entry . . . . An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act [8 U.S.C. § 1182(d)(5)], *except that . . . an alien who was granted advance parole which*

Security Act of 2002 and the transfer of immigration responsibilities to the DHS, the regulations were duplicated from Chapter I, renumbered in the 1000 series, and placed in Chapter V of Title 8. We cite to the Chapter V regulations, though the same regulations can be found in Chapter I. For instance 8 C.F.R. § 1245.1(c)(8) matches 8 C.F.R. § 245.1(c)(8).

> *the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act* [8 U.S.C. § 1225(b)(1)(A)(i)].

8 C.F.R. § 1001.1(q) (emphasis added). The Mouelles argue that their receipt of advance parole before going to Canada qualified them for the italicized exception. It did, but that exception is for the limited purpose of 8 U.S.C. § 1225(b)(1)(A)(i), which requires immigration officers to order some arriving aliens immediately removed "without further hearing or review." In other words, under the regulations, the Mouelles were arriving aliens when they sought reentry and their parole into the United States did not generally affect that status. But the italicized language does preclude expedited removal in their cases because they were granted advance parole. The regulation does not, however, allow aliens arriving with advance parol to shed their arriving-alien status for the purpose of adjusting immigration status. Rather, the quoted regulation preserves that status notwithstanding the aliens' arrival. And if such aliens are in removal proceedings when they first try to adjust status,[7] the regulations make them ineligible. So the Mouelles were arriving aliens in removal proceedings and were thus barred from adjusting their statuses.

2. Validity of 8 C.F.R. § 1245.1(c)(8)

The Mouelles argue, alternatively, that 8 C.F.R. § 1245.1(c)(8) is invalid. After this case had been argued and submitted, *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), was decided. The *Succar* court concluded that 8 C.F.R.

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[7] An arriving alien who seeks to renew an adjustment application in removal proceedings can do so under certain circumstances. See 8 C.F.R. § 1245.2(a).

§ 1245.1(c)(8) was inconsistent with 8 U.S.C. § 1255(a),[8] and was thus invalid under the first step of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, because "Congress had directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984) (quoted in *Succar*, 394 F.3d at 22). We allowed the parties to supplement their briefs, and we accepted an amicus brief in support of the Mouelles from the American Immigration Law Foundation.

We respectfully disagree with the First Circuit's decision in *Succar*. *Succar* rested on the notion that Congress had explicitly determined what classes of aliens were and were not eligible to apply for discretionary adjustment-of-status relief. 394 F.3d at 29. Given that congressional judgment—constituting, in the court's opinion, a clear expression of its intent—the court held that the regulation was invalid under the first step of *Chevron* because it added eligibility requirements. *Id.* And, even though the statute vested the Attorney General with full discretion to grant or deny adjustment-of-status relief, the court concluded that the regulation could not properly be characterized as a rule-based exercise of that discretion. *Id.*

We do not believe 8 C.F.R. § 1245.1(c)(8) is properly evaluated under Chevron's first step, given the discretionary nature of the relief available under 8 U.S.C. § 1255. While Congress surely did speak to eligibility in the statute, it left the question whether adjustment-of-status relief should be granted to the Attorney General's discretion. 8 U.S.C. § 1255(a) ("the status of an alien who was inspected and admitted or paroled . . . *may be adjusted by the Attorney General, in his discretion and under such regulations as he*

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[8] Notably, the Mouelles did not seek to adjust status under section 1255(a). They sought to adjust under section 1255(i). Nonetheless, the reasoning of the *Succar* court, if correct, is broad enough to invalidate the regulation as inconsistent with the statutory scheme at issue.

may prescribe" (emphasis added)); *id.* § 1255(i)(2) ("the Attorney General *may* adjust the status of the alien") (emphasis added). Administrators vested with such discretion may exercise that discretion by rule or on a case-by-case basis. *Bellis v. Davis*, 186 F.3d 1092, 1094-95 (8th Cir. 1999). And we can find no basis upon which to conclude that this regulation does not embody the Attorney General's decision not to afford discretionary relief to the delineated class of aliens—arriving aliens in removal proceedings. Attorney General Reno stated this discretionary-relief basis for the regulation when it was proposed. "The Attorney General has determined that she will not favorably exercise her discretion to adjust the status of arriving aliens who are ordered removed pursuant to section 235(b)(1) of the Act or who are placed in removal proceedings under section 240 of the Act." 62 Fed. Reg. 444, 452 (Jan. 3, 1997). And she again stressed the discretionary nature of status adjustments when the interim rule issued:

> Some commenters objected to the policy statement contained in the proposed rule that amended § [1]245.1(c)(8) and indicated that, as an exercise of discretion, the Attorney General would not adjust the status of arriving aliens . . . in proceedings under section 240 of the Act.
>
> . . . .
>
> In response to the commenters who suggested this policy exceeded the Attorney General's statutory authority, it is noted that section 245 of the Act [8 U.S.C. § 1255] clearly and unambiguously states that adjustment of status is a discretionary decision, subject to such regulatory limitations as the Attorney General may prescribe.

62 Fed. Reg. 10312, 10326-27 (Mar. 6, 1997). As Judge Friendly wrote with regard to 8 U.S.C. § 1255(a), "We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis . . . ." *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970); *see also Bellis*, 186 F.3d at 1095 (concluding that the Bureau of Prisons validly exercised its discretion to grant early release by "identifying additional categories of inmates who are ineligible for the early-release program"), *aff'd*, *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001).

Even though 8 C.F.R. § 1245.1(c)(8) says that the particular class of aliens at issue is "ineligible to apply for adjustment of status," that does not change matters. The *Succar* court concluded this was of primary significance, finding that Congress had unequivocally stated that statutorily eligible aliens must be allowed to apply for status adjustment. 394 F.3d at 28. But why should the Attorney General be forced to exercise his discretion through rules that speak only to the ultimate relief rather than eligibility? If the Attorney General decided that arriving aliens in removal proceedings will not be given adjustment-of-status relief (as she clearly did in promulgating this rule), and if that decision does not contravene the statute (as we conclude it does not), then it makes little sense to invalidate this regulation simply because it speaks in terms of eligibility. *See Lopez*, 531 U.S. at 243-44 ("Even if a statutory scheme requires individualized determinations, which this scheme does not, the decision-maker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. . . . Case-by-case decisionmaking in thousands of cases each year, . . . could invite favoritism, disunity, and inconsistency." (citations and quotations omitted)).

The *Succar* court concluded that *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), established the difference between statutory eligibility and the Attorney General's discretion to grant relief. It then took that premise and concluded that if Congress had spoken to eligibility, then an administrator with discretion to grant relief cannot impose eligibility requirements that are not found in the statute. We cannot find support for the latter premise in *Cardoza-Fonseca*. The Court in *Cardoza-Fonseca* did emphasize the difference between eligibility and the discretionary decision to grant relief, but it did so in a much different context than that presented here.

The BIA in *Cardoza-Fonseca* had construed the statutory eligibility standard for asylum (a form of discretionary relief) as requiring the same showing—a clear probability of persecution—as the statutory eligibility standard for withholding of deportation (a form of relief that must be given to an eligible alien). *Id.* at 443. The Court reasoned that the BIA's construction did not fit the statutes because the difference between the nature of the relief available under each—discretionary versus mandatory—evinced a congressional intent that the eligibility standard for discretionary asylum would be less demanding than the eligibility standard for mandatory withholding. *Id.* at 443-44. But the Court did not hold that the Attorney General could not by regulation determine who among the class of aliens that is statutorily eligible for discretionary relief would or would not be afforded such relief. It simply held that the BIA's interpretation of the statute in that case failed because Congress did not intend the heightened mandatory-withholding showing to apply to discretionary asylum.

This case is quite different. First, the regulation at issue does not purport to interpret statutory eligibility standards, but rather rests on the discretionary authority that Congress explicitly gave the Attorney General to grant adjustment-of-status relief. And, even if we take *Cardoza-Fonseca* as somehow relevant to our inquiry, there is no congressional

intent evinced by a similar mandatory-relief provision that limits the Attorney General's ability to determine by regulation which statutorily eligible aliens will get the relief that he has the power, but not the duty, to grant.

As a rule-based exercise of the Attorney General's discretion to allow status adjustments, we conclude section 1245.1(c)(8) of the regulations is not invalid as contrary to the statute. This does not mean, however, that the regulation is necessarily valid. To be valid, such gap-filling regulations must be "reasonable in light of the legislature's revealed design." *Lopez*, 531 U.S. at 242 (quotation omitted); *accord Fook Hong Mak*, 435 F.2d at 731 ("reasonably related to the statutory scheme"). The class of aliens delineated by 8 C.F.R. 1245.1(c)(8) consists of (1) arriving aliens who are (2) in removal proceedings. As mentioned, arriving aliens are aliens who seek admission to the United States at a port-of-entry. The Attorney General's stated reasons for delineating this class of aliens clearly show that the classification is reasonable under the statutory scheme. *See* 62 Fed. Reg. at 10312-13 & 10326-27. And arriving aliens' placement in removal proceedings is a characteristic that is a reasonably sound basis for choosing not to grant relief under 8 U.S.C. § 1255(i).[9] Applications for such relief would necessarily

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[9] The court in *Succar* opined that the relevant characteristic—placement in removal proceedings—effectively barred most aliens who had been paroled from adjusting status because most paroled aliens were in removal proceedings. 394 F.3d at 18. Thus, the court concluded, the regulation was contrary to 8 U.S.C. § 1255(a) because paroled aliens were among those eligible to adjust status under the statute. As an evidentiary matter, we cannot conclude that the regulation bars most paroled aliens from adjusting status. Unlike the court in *Succar*, we have not been "informed," *id.*, of that fact. And in this case the Attorney General cites DHS statistics suggesting that only about two to three percent of parolees who entered the United States in 2003 have been placed in removal proceedings. Resp. Supp. Br. at 13 n.1. In fact, the INS did not

lengthen removal proceedings (much like they have here), and expediency was one of the goals of the 1996 amendments to the Immigration and Nationality Act. See S. Rep. No. 104-249, 1996 WL 180026, at *2 (Apr. 10, 1996). Thus, we conclude the regulatory bar to status adjustment contained in 8 C.F.R. § 1245.1(c)(8) is valid and the BIA did not abuse its discretion by denying the Mouelles' motion to reopen on that basis.

We have considered all of the Mouelles' other arguments that are properly presented by their petitions for review, and we find them without merit.

III. CONCLUSION

Accordingly, we deny the petitions.

DISSENT

BYE, Circuit Judge.

I respectfully dissent. I would hold 8 C.F.R. § 1245.1(c)(8) is invalid for the reasons articulated in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Accordingly, I would vacate the removal orders and remand for further proceedings.

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initiate removal proceedings against the Mouelles until April 15, 1998, over ten months after the Mouelles were paroled into the United States. Moreover, even if we assumed that most aliens paroled into the United States were placed in removal proceedings, 8 U.S.C. § 1255 does not show a congressional intent to vest a few, most, or all paroled aliens with the right to adjust their status. Relief remains discretionary.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 03-1760/03-3086

JEAN MOUELLE; GERMAINE MOUELLE,

PETITIONERS,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

RESPONDENT.

October 26, 2005

Order Denying Petition for Rehearing and for Rehearing En Banc.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-01199)

Order Entered at the Direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, VA 22041

DECISION OF THE BOARD OF
IMMIGRATION APPEALS

Files: A75 016 234 – Bloomington, Minnesota
A75 016 233

Date: Jul. 22, 2003

In re: JEAN MOUELLE
GERMAINE M. MOUELLE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Nancy A. Peterson, Esquire

ON BEHALF OF DHS: Richard Soli, District Counsel

APPLICATION: Reopening

Now before the Board of Immigration Appeals is the respondents' timely filed motion to reopen. The respondents, who are a married couple, seek reopening to apply on remand for adjustment of status. The female respondent has an approved third preference skilled worker visa petition. As pointed out in the opposition memorandum by the Department of Homeland Security (the "DHS," formerly the

Immigration and Naturalization Service), the respondents are ineligible for adjustment of status because they are "arriving aliens" in removal proceedings, notwithstanding the approved visa petition. *See INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam); section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255; 8 C.F.R. § 245.1(c)(8) (2003) (now renumbered as § 1245.1(c)(8)). Accordingly, we will deny the motion to reopen.

ORDER: The motion to reopen is denied.

/s/ Edward R. Grant
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, VA 22041

DECISION OF THE BOARD OF
IMMIGRATION APPEALS

Files: A75 016 234 – Bloomington, Minnesota
A75 016 233

Date: Dec. 02, 2003

In re: JEAN MOUELLE
GERMAINE M. MOUELLE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Nancy A. Peterson, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law (both respondents)[1]
Lodged: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] – Immigrant – no

[1] During the course of proceedings, the DHS withdrew this charge of removability against both respondents.

valid immigrant visa or entry document (both respondents)

Sec. 212(a)(7)(B)(i)(II), I&N Act [8 U.S.C. § 1182(a)(7)(B)(i)(II)] – Immigrant – no valid immigrant visa or entry document (Both respondents)

APPLICATION: Reconsideration

ORDER:

PER CURIAM. The record in this case was last before us July 22, 2003, when we denied the respondents' motion to reopen. The respondents have filed a timely motion to reconsider. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not filed a response to the motion.

In our prior order, we denied the respondents' motion to reopen, in which they sought to apply for adjustment of status, because they are "arriving aliens" in removal proceedings and thus are ineligible to adjust their status to that of lawful permanent residents. *See* Decision of Board.

A motion to reconsider asserts that the Board made a factual or legal error at the time it rendered the previous decision. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd*, 979 F.2d 212 (11th Cir. 1992) (table case); *see also* 8 C.F.R. § 1003.2(b) (2003). The respondents assert that we erred in determining that they were arriving aliens because they were paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5), prior to April 1, 1997. The respondents alternatively request that we hold the regulations to be *ultra vires* to the Act. *See* Motion to Reconsider.

Specifically, the respondents argue that 8 C.F.R. § 1001.1(q) excludes aliens who were paroled into the United States before April 1, 1997, from the definition of "arriving alien." However, a plain reading of the entirety of subsection

(q) demonstrates that such parolees are not to be considered arriving aliens solely for the purposes of expedited removal under section 235(b)(1)(A)(i) of the Act, 8 U.S.C. 1225(b)(1)(A)(i). The exclusion of such parolees from the regulatory definition of "arriving alien" is for a specific and limited purpose. Accordingly, it is reasonable to consider pre-April 1, 1997, parolees as arriving aliens for all other purposes.

The regulations further provide that an arriving alien who is in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, is ineligible for adjustment of status. 8 C.F.R. § 1245.1(c)(8). The respondents in the instant case are in removal proceedings under section 240 of the Act and, thus, are ineligible to adjust their status.[2] Accordingly, we find no error in our prior order denying their motion to reopen.

As far as the respondents' argument that the Attorney General's regulations are *ultra vires* to the Act, we lack the authority to make such a ruling, and, therefore, we decline to consider such argument. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335,339 (BIA 1991) (stating that it is "well-settled that it is not within the province of this Board to pass on the validity of the statutes and regulations we administer").

In light of the foregoing discussion, the respondents' motion to reconsider is denied.

/s/ David B. Holmes
FOR THE BOARD

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[2] We note that the forms on which the DHS used to add charges of inadmissibility against the respondents, Form I-261, incorrectly suggest that the respondents are in "deportation proceedings" under former section 242 of the Act. However, it is clear that the DHS simply used an outdated version of the form, and as indicated by the original Notices to Appear, the respondents are in removal proceedings pursuant to current section 240 of the Act.